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11
12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF WASHINGTON**

14 ELF-MAN, LLC,

15 Plaintiff,

16 vs.

17 RYAN LAMBERSON,

18 Defendant.
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No. 2:13-CV-0395-TOR

DEFENDANT LAMBERSON'S
REPLY MEMORANDUM IN
SUPPORT OF MOTION TO
COMPEL DISCOVERY OR FOR
ISSUANCE OF LETTERS OF
REQUEST

Without Oral Argument

1 Ryan Lamberson submits this Reply Memorandum in Support of His Motion
2 to Compel Discovery (ECF No. 42/45). This Reply Memorandum is supported by
3 the Declaration of Jeffrey R. Smith, counsel for defendant, and its Exhibits.
4

5 Plaintiff's Memorandum in Opposition (ECF No. 48) does not dispute any of
6 the operative facts submitted by defendant to support his Motion to Compel
7 Discovery. Consequently, the law and the equities weigh in favor of an Order
8 compelling the deposition of plaintiff's investigators in Spokane.
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10 For example, plaintiff does not dispute that Messrs Patzer and Macek are the
11 only apparent "witnesses" as to the allegations that Mr. Lamberson somehow
12 violated the Copyright Act. Plaintiff does not dispute that Messrs Patzer and Macek
13 are operating from Germany.
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16 **I. There is no "informal" process for deposing German nationals.**

17 As detailed in Mr. Smith's initial Declaration (ECF. No. 43) submitted with
18 the Motion (ECF No. 45), there is no "informal" process for taking a deposition of a
19 German national from the United States. Plaintiff cites Fed. R. Civ. P. 28(b)(1)(C)
20 and the Declaration of plaintiff's counsel to suggest that there may be some
21 informal process of taking these depositions from the United States, for example by
22 telephone. But the international law appears to be clear that there is no legal manner
23 in which to accomplish this as to a German national. After the submission of
24 plaintiff's Memorandum in Opposition (ECF No. 48), defense counsel contacted
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1 plaintiff's counsel providing a detailed analysis of the operative law and asking for
2 an explanation how the informal process suggested by plaintiff could possibly work.
3 (Smith Declaration at 2, Exhibit A). This inquiry also requested available dates for
4 such a deposition, if it could be legally conducted. To date, we have received no
5 substantive reply from plaintiff's counsel – no explanation how the suggested
6 procedure would be lawful, and no indication if the witnesses would be produced on
7 the requested dates. Plaintiff's inability to explain how such a deposition could
8 legally be conducted is further confirmation that the equities favor Mr. Lamberson's
9 request.
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13 *Slauenwhite v. Bekum Maschinenfabriken*, 104 F.R.D. 616, 619 (D. MA.
14 1985) supports the relief requested by Mr. Lamberson. The District of
15 Massachusetts denied a protective order sought by a German party to require its
16 deposition in Germany. Instead, the Court required the deposition to take place in
17 the district of the lawsuit. In denying the request to force the deposition in
18 Germany, the Court reviewed the difficulty of taking the depositions of German
19 nationals under the Hague Convention:
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23 “The [Hague Convention] treaty does not prohibit the taking of
24 discovery in this country [the United States].... Nor does it require an
25 initial resort to the procedures of the [Hague] Convention....
26 Requiring resort to the procedures of the Convention at this time
would be tantamount to an order denying the plaintiff the discovery he
seeks.” (At 618-619).

1 **II. The Court has discretion to Order the depositions in this District.**

2 Although defendant has captioned its Motion as one to “compel discovery,”
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4 the request is also essentially one for a “protective order” requesting the same relief.
5 Courts addressing these issues use both Rules 37 and 26 in ruling on similar
6 motions.

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8 This Court has ruled that it has the discretion to set the time and place of
9 conducting witness depositions. *Detweiler Bros. v. John Graham and Company*,
10 412 F. Supp. 416, 422 (E.D. Wa. 1976). *Detweiler* denied the plaintiff’s request for
11 the defendant to be required to pay the costs of producing plaintiff’s employee-
12 witness in the Eastern District of Washington for deposition:
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14 “As a normal rule plaintiff will be required to make himself
15 available for examination in the district in which he has brought suit,
16 and costs are not allowable absent good cause. This rule would also
17 apply to plaintiff’s agents and employees, especially where, as here,
18 plaintiff is responsible for their absence from the district.” (At 422,
19 citations omitted).

20 *Grotrian, Helfferich Schultz v. Steinway & Sons*, 54 F.R.D. 280, 282
21 (S.D.N.Y. 1971) grants a requested protective order requiring a plaintiff to take the
22 deposition of a German witness in the New York venue of the case:
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24 “Since plaintiff has chosen this forum, it cannot impose upon
25 defendant the extraordinary expense and burden of traveling to a
26 foreign country to conduct a deposition except on a showing of burden
 and hardship to the plaintiff.” (At 281).

1 *Minnesota Mining & Manufacturing Co. v. Dacar Chemical*, 707 F. Supp. 793,
2 795 (W.D. Pa. 1989) granted a defendant's Motion to Compel. The ruling required
3 the plaintiff to produce the patent attorney witness who wrote the patent-in-suit to
4 appear in the district of the lawsuit for deposition, as opposed to his place of
5 residence. Plaintiff argued it did not "choose" the forum, because it had to come to
6 the venue of the accused infringer, but the Court rejected this point:
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9 "It is true that frequently plaintiffs do not choose the forum in
10 the sense of selecting the one most advantageous forum from many
11 available. Nonetheless it is plaintiffs which make the primary choice
12 to bring suit or not, and thus choose a forum. It is only appropriate
13 that in making that decision, plaintiffs must consider the costs of
14 prosecuting that suit, rather than rely on shifting the cost onto
15 defendants before adjudication on the merits." (At 795).

16 Indeed, even a defendant's witnesses can be compelled to travel at their
17 expense to the United States for deposition as was the Court's ruling in the civil
18 forfeiture case of *United States v. \$160,066.98 from Bank of America, et al.* 202
19 F.R.D. 624, 624-631 (S.D. CA. 2001) requiring Pakistani defense witnesses to
20 appear in San Diego, and taking into account the relative travel expenses of the
21 attorneys and court reporters. *Fausto v. Credigy Services*, 251 F.R.D. 427, 429-431
22 (N.D. CA. 2008) is in accord, granting a Motion to Compel and denying a Motion
23 for a Protective Order, requiring employee witnesses of the defendant Brazilian
24 company to appear in the United States for deposition.
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1 **III. Plaintiff does not dispute that its investigators operated in violation of**
2 **Washington law.**
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4 Plaintiff's opposition to this Motion does not dispute the numerous infirmities
5 of the work of its investigators, including that the investigators are operating in
6 contravention of the Washington Private Investigator regulations at RCW 18.165.
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8 The statutory scheme at RCW 18.165 is clear: If an investigator is engaged in
9 "detecting, discovering, or revealing" "evidence to be used before a court" then the
10 investigator must be licensed and bonded. Messrs Macek and Patzer are not
11 licensed and bonded in Washington, yet the plaintiff has selected these individuals
12 to detect, discover or reveal evidence it plans to introduce into court. Plaintiff could
13 have used the investigation from Messrs Patzer and Macek to hire a licensed local
14 investigator to confirm the "infringement" – a local investigator who would be
15 subject to the jurisdiction of the court and to service of process to compel testimony.
16 Plaintiff should not be able to hide behind the illegalities of its investigators by
17 refusing to bring them to the situs of the case for deposition. The equities support
18 compelling the plaintiff to produce the witnesses in Spokane.
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20 **IV. Plaintiff does not dispute the limitations of its investigation.**
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22 Plaintiff does not dispute that neither it nor its counsel hired the investigators.
23
24 Plaintiff does not dispute that the entirety of its liability evidence is that its
25 investigator's system does a "handshake" with an IP address and then sends a
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1 request for a bit to that IP address and in turn receives a bit. In the case of Mr.
2 Lamberson, Plaintiff does not dispute that that the uploaded bit from the IP address
3 associated with Mr. Lamberson may be too small to be perceptible, or that the
4 investigator's machine doing the actual uploading may have been in The
5 Netherlands, not Germany. Plaintiff does not dispute that its investigation does not
6 account for "false positives" that could lead to erroneous identification of IP
7 addresses, including that bittorrent "client software" can allow the "spoofing" of IP
8 addresses (i.e. a person in a swarm can "make up" an IP address that is displayed to
9 the others in the swarm). The bottom line is that defendant must be able to depose
10 Messrs Patzer and Macek and then to compel their testimony at trial in order for Mr.
11 Lamberson to be fully exonerated. Despite defendant's offer to require the plaintiff
12 to bring the witnesses to Spokane only once for deposition and then a perpetuation
13 deposition to be usable at trial, plaintiff has not offered to make them available, nor
14 made any suggestion as to how to lawfully depose them.

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20 **V. Plaintiff continues to hide its relationship with the investigators.**

21 As noted in the Motion to Compel, defense counsel remains unsatisfied with
22 plaintiff's explanation of the relationship of plaintiff to the investigators. (ECF No.
23 43, Exhibit F). On May 2, 2014, Plaintiff did reply to defendant counsel's inquiry
24 (Smith Dec. Exhibit B, filed under seal), deriding the inquiry as "more like a
25 conspiracy novel than a legitimate request for additional discovery" and failing to
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1 provide any further explanation as to exactly how Mr. Macek, a German national,
2 could possibly be “working for” a delinquent South Dakota corporation, and how
3 such a delinquent South Dakota company with no offices could have “been
4 retained” by Anti-Piracy Management Company, a company that pretends to have
5 an office in Sacramento, California (but presumably is located in Karlsruhe,
6 Germany) – all without any paperwork or financial terms. The May 2, 2014
7 explanation indicates “Mr. Macek is paid at a set rate in the form of a monthly
8 salary which was in no way contingent upon the results of the subject investigation
9 nor the outcome of this litigation” – but how could this be the case? How could a
10 German national work for a delinquent South Dakota company? The May 2, 2014
11 explanation indicates “We have provided every document that exists concerning the
12 subject relationships,” but this cannot be true since the explanation also admits “the
13 parties to this arrangement are working upon but have not yet finalized the financial
14 terms of their arrangement.” There must be some written explanation as to why the
15 financial terms were redacted from the APMC agreement provided in discovery and
16 there must be some written explanation why there are no terms at all with Crystal
17 Bay. Indeed, if the South Dakota company Crystal Bay Corporation were a real
18 company, we could seek discovery from it, but, as our April 16 letter questions, how
19 could we seek discovery from a company with no office, and with a registered agent
20 with no office? (Smith Dec. at ¶¶4-6, Exhibits C, D, E, and F).

1 To compound matters, it appears the identical Stuttgart, Germany addresses
 2 for Messrs. Patzer and Macek provided by plaintiff in the Initial Disclosures (Smith
 3 Dec. Exhibit G) may be entirely inaccurate. Both Messrs Patzer and Macek are
 4 identified in plaintiff's initial disclosures as having an identical address of
 5 "Heilbronnerstr. 150, 70191 Stuttgart, Germany," but our investigation shows this
 6 building is a "mail drop" and a place where offices can be rented for a short term,
 7 including by the hour. (Smith Dec. ¶7). Mr. Patzer was identified as a plaintiff's
 8 witness in Initial Disclosures in another U.S. bittorrent case as having an address of
 9 "Flat 9, Queens Mansions, 1A Queens Gardens, BN21 3EG Eastbourne, United
 10 Kingdom." (Smith Dec. Exhibit H). These other Initial Disclosures were signed by
 11 that plaintiff's attorney on May 2, 2014 – after the filing of this Motion to Compel,
 12 but prior to Elf-Man LLC's Memorandum in Opposition – yet Elf-Man LLC's
 13 opposition says nothing about the true location of Mr. Patzer and whether it is in
 14 Germany or the U.K. We informed plaintiff of this discrepancy and requested
 15 clarification, but have received nothing. (Smith Dec. Exhibit I). The bottom line is
 16 that the plaintiff is doing nothing to aid in the discovery from its only witnesses.

22 **VI. The balance of equities favors the depositions in Spokane.**

23 Denial of the present Motion to Compel would leave Mr. Lamberson without
 24 recourse to compel the testimony of the only fact witnesses against him. In other
 25 words, even if Mr. Lamberson were able to depose Messrs. Patzer or Macek in
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1 Germany, and such deposition exonerates Mr. Lamberson, Mr. Lamberson might
2 not be able to compel these witnesses to Spokane for trial. This result would render
3 plaintiff's choice of forum a *forum non conveniens*:
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5 "To fix the place of a trial at a point where litigants cannot
6 compel personal attendance and may be forced to try their cases on
7 deposition, is to create a condition not satisfactory to the court, jury,
8 or most litigants." *Gulf Oil v. Gilbert*, 330 U.S. 501, 511(1947)

9 *Gulf Oil v. Gilbert*, 330 U.S. 501, 511(1947) affirmed dismissal of an action
10 under principles of *forum non conveniens* when necessary fact witnesses could not
11 be compelled to trial. *See also, Interface Partners v. Hananel*, 575 F.3d 97, 105 (1st
12 Cir. 2009) (Israeli witnesses available only by videoconference weighed in favor of
13 *forum non conveniens* dismissal); and *Kultur Int'l Films v. Covent Garden Pioneer*,
14 860 F.Supp. 1055, 1067-1068 (D. N.J. 1994) (videotaped deposition of key witness
15 to breach of contract and tort case would not be an acceptable substitute for his live
16 testimony, which could not be compelled in the United States, but could be
17 compelled in England, and thus weighed in favor of *forum non conveniens*
18 dismissal).
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22 **VII. Conclusion.**

23 Defendant respectfully requests an Order that Plaintiff be required to produce
24 its two fact witnesses Messrs Patzer and Macek in Spokane for deposition at
25 plaintiff's expense.
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1 DATED this 20th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2014, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Maureen C. VanderMay efile@vandermaylawfirm.com

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